**NO. 15892**

IN THE

# United States
# Court of Appeals
## For the Ninth Circuit

M. H. SHERMAN COMPANY,
a corporation,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

Appeal from the United States District Court
for the District of Arizona

## BRIEF OF APPELLEE

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## BRIEF OF APPELLEE

### JURISDICTION

The Government has from the inception of this case denied that the District Court had jurisdiction of the case, and it is still the contention of the Government that this action was not properly brought in the District Court. The reasons for attacking jurisdiction of the District Court will be set out more fully in a subsequent portion of this brief.

### STATEMENT OF THE CASE

This action was commenced by a complaint filed in the District Court on October 5, 1954, and after the Government's motion to dismiss had been granted the amended complaint was filed on October 27, 1955, some three years after the expiration of the lease in question.

The essential facts of the case were stipulated for trial, and the District Court found for the Government on the merits.

## ISSUES INVOLVED

The issue on the merits is whether the Government, under the terms of the lease, was required to remove improvements from appellant's land.

On the jurisdictional issues the questions presented are whether this type of action can properly be maintained under the Tort Claims Act and whether, if so maintainable, the amended complaint was within the period of the Statute of Limitations provided by the Tort Claims Act.

## ARGUMENT

Appellant, plaintiff below, claims at page 5 of its brief that the action of the Government in failing to remove additions and structures from appellant's land . . . "constituted a tortious act on the part of the Government and a violation of a duty it owed the plaintiff arising out of the contract and irrespective of the terms of the lease."

Appellant has not cited any authority for the proposition that the Government had a duty irrespective of the terms of the lease to remove improvements from the land which were placed thereon under the specific authority of the lease. In fact, the rule is that the lessee is not required to remove improvements made by him with the consent of the landlord or under the authority of the lease in the absence of express requirement by the lease.

*36 Corpus Juris,* pp. 199-200, par. 864.

*51 C.J.S.,* p. 1157, par. 408.

It is true that the tenant must not commit or suffer waste of the freehold. But waste in this real property sense is described as an abuse or destructive use of

property by one in rightful possession; it may be voluntary waste which is an active or positive act of spoliation or destruction of the freehold, or it may be a failure to exercise due care in the protection of the freehold, such as allowing buildings to fall for want of repair.

*56 Am. Jur.,* p. 452, par. 4.

*Black's Law Dictionary,* 4th Edition, p. 1760.

A lease agreement may permit or authorize acts or conduct which would noramlly constitute waste. Every lease agreement which allows the tenant to make changes or additions to the land permits waste in a limited sense.

*56 Am. Jur.,* pp. 453-455, pars. 7 and 9.

The acts of the Government did not constitute waste, for the lease allowed the improvements to be placed on the land (Lease, par. 8, TR. 36). In order for an action for waste to lie, the acts must involve the action or failure to act of the tenant in possession. Appellant does not claim that the Government committed any unauthorized act during the term of the lease; hence, the real property action of waste does not lie in this case.

Appellant cites authority dealing with the question of negligence and the effects of contracts to relieve persons of their negligent acts. *United States* v. *Kelley,* 236 F. 2d 233. But appellant confuses contracts to avoid liability for negligence with contracts to allow a tenant to use land in a certain manner. The former type of contracts are not favored in the law, but the latter type of contracts are approved even though a tenant's acts would otherwise constitute waste.

*56 Am. Jur.,* p. 455, par. 9.

Thus authorities on negligence have no place in this case, for there certainly is no question of common negligence involved.

The original improvements were placed on the land by the express authority of the lease. (Paragraph 8, TR. 36-37.) The lease did permit the Government to remove improvements, but nothing in the lease stated that the improvements had to be removed. The very terms of the lease gave the Government the continuing right to make, alter, and erect structures on the land during the period of the lease. There is no claim or showing that either voluntary or permissive waste was committed by the Government during the period of the lease, and the leaving of the improvements on the land is not waste as the authorities consider and define it.

The standard form lease used by the Government in this case did have a restoration clause as part of paragraph 8, but this section was deleted by the parties. The section deleted read:

> . . . , "and the Government, if required by the Lessor, shall before the expiration of this lease or renewal thereof, restore the premises to the same conditions as that existing at the time of entering upon the same under this lease, reasonable and ordinary wear and tear and damages by the elements or by circumstances over which the Government has no control, excepted. Provided, however, that if the Lessor requires such restoration, the Lessor shall give written notice thereof to the Government . . . . days before the termination of the lease." (TR. 37)

To the lease was added the provisions of paragraph 12:

> "A joint survey and inspection of the conditions of the within-described premises has been made and reveals the property to be unimproved desert land, on which there are no physical improvements, and the lessor agrees to the foregoing statement and hereby relieves the Government of any and all restoration responsibility resulting from the use of the subject lands by the Armed Forces." (Tr. 38)

The lease must be read as a whole to determine the intent of the parties, and considering the lease as allowing the placing of improvements on the land, deleting a restoration clause, and inserting a clause which stated that the Government was relieved of all restoration responsibility resulting from the use of the land could only mean what its unambiguous terms implied, namely, that the Government did not have any restoration responsibility, that is, it did not have to remove the improvements it might place on the land.

*United States* v. *Jordan,* 186 F. 2d 803, cited in appellant's brief, is not authority against the Government's position, and in fact it tacitly admits that the Government may contract to relieve itself of any possible restoration damages in its use of land. The *Jordan case* involved both leased land and condemned land, and the Court held that: "The releases and stipulations, together with the judgments entered on the stipulations, were properly set aside as being based on a mutual mistake of fact." This mistake arose due to both parties being unaware of hidden defects in the timber on the land which made it unmarketable. But in our case there is no showing of any mutual mistake. The lease agreement provided that additions and structures could be placed on the land, so the parties knew that such use was contemplated, and in the same lease agreement the parties agreed to delete a clause which required restoration of the premises, and instead the parties inserted a clause which exempted the Government of *any and all* restoration responsibility.

While appellant emphasizes the cost of removing the improvements from the land, there is not a murmur concerning the great increase in value which time and circumstances have added to this once desert land. This increase in value will easily compensate for the cost of removing improvements and still leave a handsome return on appellant's speculation.

## JURISDICTIONAL MATTERS

The Complaint originally filed in this action alleged a claim for relief consistent with a claim under the Tucker Act (28 U.S.C. 1346(a)(2)), but the claim, being in excess of $10,000, was beyond the jurisdiction of the District Court. The Government's Motion to Dismiss was granted, but on the basis that appellant had failed to comply with Rule 8 by alleging the grounds for Federal Jurisdiction (TR. 24). Leave to amend was granted at the time the Complaint was dismissed. It is the contention of the Government that the original Complaint alleged a contract action, and due to the amount of the claim, the District Court was without jurisdiction. Thereafter, appellant amended its complaint to seek relief under the Tort Claims Act.

Appellant was hard pressed to avoid the clear indication that this entire case was at most a contract action, and the appellant is still not clear as to whether his action is one based on waste or negligence, but the type of action alleged in the original complaint was one in contract.

It is, of course, basic that no suit may be brought against the sovereign without specific statutory consent, and when suits are authorized, they must be brought only in the designated courts.

*United States* v. *Shaw,* 309 U.S. 495, 500.

Statutes which waive immunity of the United States from suit are to be strictly construed in favor of the sovereign.

*McMahon* v. *United States,* 342 U.S. 25, 27.

Appellant amended its complaint after the Government's Motion to Dismiss had been granted, and the amended Complaint claimed jurisdiction under the Tort Claims Act. 28 U.S.C. 1346(b). It is the contention

of the Government that the type of action alleged in the Amended Complaint was not properly maintainable under the Tort Claims Act. The last mentioned act was meant to provide a remedy for those who had been without one.

Ferres v. United States, 340 U.S. 135, 140.

In this case appellant had a remedy under the Tucker Act, and this remedy had been in use for years before the Tort Claims Act came into existence.

*United States* v. *Bostwick,* 94 U.S. 53.

As a result of the facts proved in the case, the Government believes that the Tort Claims Act was shown not to be applicable to the case because no tortious conduct was proved.

It is clear from the record that the Amended Complaint was filed three years after the cause of action arose, and unless the Amended Complaint relates back to the original filing of the Complaint the Statute of Limitations of two years had expired. 28 U.S.C. 2401(b).

The Statute of Limitations in the Tort Claims Act is more than mere procedure. It is a matter of compliance with the terms of the statute as a condition precedent to maintenance of the action.

*Simon* v. *United States,* 244 F. 2d 703.

When the original Complaint was filed, the District Court did not secure jurisdiction as the action was under the Tucker Act and beyond the District Court's jurisdictional amount. By the time the Amended Complaint was filed the Statute of Limitations had already run, and the rule is that the Amended Complaint cannot relate back to the date of the filing of the original Complaint when the Court did not have jurisdiction of the original complaint.

*Hammond-Knowlton* v. *United States,* 121 F. 2d 192.

*Dell* v. *American Export Lines,* 142 F.S. 511 at 513.

Nor is the result changed by the liberal relation back doctrine of amendments provided by the Federal Rules of Civil Procedure. These rules apply when the District Court has jurisdiction, and until the court has jurisdiction the rules of procedure have no application.

*United States* v. *Sherwood,* 312 U.S. 584, 591.

## CONCLUSION

The Government believes that the District Court was correct in the decision on the merits of the case, but despite the favorable decision on the merits, the importance of the jurisdictional issues involved in this case require that those issues be presented to this Court.

The Government respectfully urges that from the law and facts applicable to the case, the decision of the District Court should be affirmed or in the alternative that the action be dismissed for lack of jurisdiction.

Respectfully submitted,

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